UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JEANNE MARCHIG and THE MARCHIG ANIMAL WELFARE TRUST, :

Plaintiffs, :

-against- : Case No. 10 Civ. 3624 (JPO)

CHRISTIE'S INC., :

Defendant. :

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DEFENDANT CHRISTIE'S INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE TESTIMONY OF PLAINTIFF JEANNE MARCHIG PURSUANT TO FED. R. CIV. P. 37

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Pursuant to Fed. R. Civ. P. 37, Defendant Christie's Inc. ("Christie's") states as follows in support of its motion to preclude the testimony of Plaintiff Jeanne Marchig ("Marchig"):

PRELIMINARY STATEMENT

From the very first case conference in this matter, Marchig has repeatedly sought to schedule a time to make herself available for deposition because of the risks posed by her advanced age and apparent health problems, but she has never presented herself. Over the course of several months, Marchig's counsel offered a number of suggestions for the taking of his client's deposition, including at locations, such as the Canary Islands, that corresponded with her vacation schedule. Even after this Court dismissed all of Plaintiffs' claims, Marchig continued to insist on the taking of her deposition, in the event her appeal to the Second Circuit led to a reversal.

This insistence suddenly came to an end when this Court ruled that Marchig would have to bear the expense of Christie's counsel if her deposition were to be conducted abroad at or near her home in Geneva. Thereafter, Marchig, using her age and health as an excuse, sought to be relieved of the obligation to provide an in-person deposition. Marchig first proposed that she be deposed right before trial and then proposed that her deposition be conducted via video conference. By agreeing to appear for a video deposition, Marchig made clear that she was able to sit for an in-person deposition but just did not want to pay for it. This Court rejected both of Marchig's proposals and directed Marchig to submit to a deposition by November 30, 2011, or otherwise run the risk of preclusion. Christie's repeatedly expressed its willingness to go to Geneva to take Marchig's deposition and stood ready to do so up to the November 30 deadline. Marchig, however, failed to appear for a deposition as ordered by the Court. Christie's therefore seeks to preclude the use of Marchig's testimony, either in response to Christie's anticipated motion for summary judgment, in support of her own motion for summary judgment, at trial, or otherwise. Marchig should not be allowed to prejudice Christie's by refusing to appear for a deposition and later offering new and untested testimony during the critical, case-deciding phases of this litigation. Preclusion is the sole appropriate remedy.

PROCEDURAL BACKGROUND

On July 19, 2010, with Christie's initial motion to dismiss Plaintiffs' complaint pending before the Court, Marchig's counsel wrote to Judge Koeltl, advising him of Marchig's "health problems" and requesting that her deposition be taken in Europe along with other potential witnesses. *Letter from R. Altman to Judge Koeltl*, July 19, 2010 (Exhibit A to Affidavit of Joseph A. Patella ("Patella Aff.")). In a September 13, 2010 e-mail to Christie's counsel, Marchig's counsel again proposed dates for her deposition in Europe, stating that Marchig "is willing to travel from Geneva to London for this purpose." *R. Altman Email to J. Patella*, Sept. 13, 2010 (Ex. B to *Patella Aff.*). Christie's expressed its willingness to travel to Europe to conduct Marchig's deposition and repeatedly offered to do so as the discovery period continued.

Then, by letter dated January 5, 2011, Marchig's counsel advised Judge Koeltl that Marchig "intends to come to New York in the spring, around March or April" for the purpose of her deposition. *Letter from R. Altman to Judge Koeltl*, Jan. 5, 2011 (Ex. C to *Patella Aff.*). After the Southern District dismissed the case in its entirety on February 1, 2011, and with Marchig's appeal pending before the Second Circuit, her counsel sent a letter to the Second Circuit, dated April 29, 2011, requesting expedited oral argument because "Mrs. Marchig is elderly and not in good health, but she has nonetheless expressed a strong desire to attend the oral argument by traveling to New York from her home in Switzerland." *Letter from R. Altman to Second Cir.*, Apr. 29, 2011 (Ex. D to *Patella Aff.*). With the appeal still pending, her counsel made an application to Judge Koeltl, by letter dated June 14, 2011, requesting permission to file a motion under Federal Rule 27(b) to permit the taking of Marchig's deposition pending appeal. The letter stated, in part:

> During a visit with her in May at her home, I observed that her health was not good, and she told me of her health problems. Despite those problems, however, she has told me that she is willing to travel to London for the deposition, but that a trip to New York would be far too stressful for her. So I would propose to do the deposition there around the last week of July.

Letter from R. Altman to Judge Koeltl, June 14, 2011 (Ex. E to *Patella Aff.*). Christie's counsel responded two days later with a letter to Judge Koeltl which stated, in part:

> Mr. Altman has, in the past, suggested holding this deposition variously in Switzerland, London, the Canary Islands and New York, depending on Mrs. Marchig's vacation plans. And yet, Mr. Altman never went forward with scheduling the deposition during the pendency of this case before this Court. In response to the instant request, we indicated that, since the appeal has been accelerated and is being argued next week at Mrs. Marchig's request, it would seem that the appeal will be resolved very promptly and conducting a deposition to preserve her testimony is not genuinely necessary right now.

Letter from R. Altman to Judge Koeltl, June 16, 2011 (Ex. F to *Patella Aff.*). The parties appeared for a conference before Judge Koeltl on June 23, 2011, at which time the Court directed Marchig to pay the expenses of Christie's counsel if the examination was to be conducted abroad.

Following the Second Circuit's decision remanding Plaintiffs' replevin claim to this Court, Marchig's attorney wrote to Judge Koeltl, by letter dated September 7, 2011, requesting that the issue of expenses be revisited. *Letter from R. Altman to Judge Koeltl*, Sept. 7, 2011 (Ex. G to *Patella Aff.*) ("While the Court has previously stated that Mrs. Marchig would have to pay their costs, I would respectfully ask that the decision be revisited at the conference, now that Christie's appears to be much more eager to take Mrs. Marchig's deposition than they were before the appeal."). At a case scheduling conference on September 8, 2011, Judge Koeltl reaffirmed that, as the party who decided to litigate in New York, Marchig was to bear Christie's costs for her deposition if she refused to come to New York. Judge Koeltl requested only that Christie's revise (*i.e.*, reduce) its proposed expenses to a reasonable amount for a shortened deposition, which was done.

Undaunted, Marchig went back to the Court again in October, this time requesting that she be permitted to appear for a deposition the week immediately prior to trial. *Letter from R. Altman to Judge Oetken*, Oct. 20, 2011 (Ex. H to *Patella Aff.*). In an Order dated October 24, 2011 [by Minute Entry], the Court declined her request, and directed Marchig to appear for her deposition by November 30, 2011, giving her two extra weeks after the close of fact discovery. One day later, Christie's noticed Marchig for a deposition in New York on November 29, 2011. *Notice of Deposition* (Ex. I to *Patella Aff.*).

At the eleventh hour, with the November 30 deadline looming, Marchig's counsel once more wrote to the Court, requesting that Marchig be deposed by video (at Christie's expense). *Letter from R. Altman to Judge Oetken*, Nov. 17, 2011 ("Altman Nov. 17 Letter") [*see* Dkt No. 44]. For the first time, Marchig submitted doctors' notes advising her not to travel. Christie's responded on the same date, reminding the Court that Marchig had agreed to appear for a deposition at various times and at various locations since initiating the case, despite her age and condition, and never before presented doctors' notes, despite having had many months to do so. *Letter from J. Patella to Judge Oetken*, Nov. 17, 2011 [Dkt No. 45]. The Court denied Marchig's last-minute request and – once again – ordered her to appear for deposition. *Endorsement Order*, Nov. 21, 2011 [Dkt No. 44]. In its November 21 Order, the Court stated that Marchig's testimony "may be subject to preclusion … [i]f [she] fails to complete her deposition." Christie's remained ready to conduct Marchig's deposition in New York, as noticed, or to travel to Geneva for this purpose. Marchig, however, refused to appear for an in-person deposition at any location.

Christie's accordingly requested, by letter dated December 5, 2011, that this Court preclude the testimony of Marchig for all purposes. *Letter from J. Patella to Judge Oetken, Dec. 5, 2011* (Ex. J to *Patella Aff.*). Marchig opposed the request by letter the following day. *Letter from R. Altman to Judge Oetken*, Dec. 6, 2011 (Ex. K to *Patella Aff.*). The Court ordered the parties to brief the issue [Dkt No. 46].

ARGUMENT

I. RULE 37 AUTHORIZES PRECLUSION OF MARCHIG'S TESTIMONY.

The Federal Rules approve preclusion of witness testimony where, as here, the party seeking to support its case with that testimony has failed to comply with court orders or has refused to permit discovery. Pursuant to Fed. R. Civ. P. 37(b)(2)(A)(ii), "If a party … fails to obey an order to provide or permit discovery, … the court where the action is pending may issue further just orders. They may include the following: (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence…." When "there is a clearly articulated order of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order." *Daval Steel Products, Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991). Here, the Court *twice* ordered Marchig to complete her deposition (Oct. 24, 2011 Minute Entry; Nov. 21, 2011 Endorsement Order) and she failed to comply.

New York courts weigh several factors in determining the propriety of preclusion of witness testimony:

> (1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice

> suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance.

Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 269 (2d Cir. 1999), *quoting Softel, Inc. v. Dragon Medical Scientific Comm. Inc.*, 118 F.3d 955, 961 (2d Cir. 1997).

With less than two-weeks before the Court-imposed deadline of November 30, 2011 for completing Marchig's deposition, her counsel wrote to the Court seeking to prevent Christie's from taking an in-person deposition due to her health issues and advanced age, suggesting instead a deposition by video conference. *See Altman Nov. 17 Letter*. However, as documented in Christie's response of the same date, from the early stages of this case, Marchig's attorney has repeatedly advised the Court and Christie's of his client's poor health and yet, on each occasion, expressed an eagerness to arrange Marchig's deposition, whether in Europe or New York. *See Letter from J. Patella to Hon. J. Paul Oetken*, Nov. 17, 2011. Moreover, by agreeing to appear and answer questions by video conference, Marchig conceded that she could sit for an in-person deposition. Her refusal to do so is indicative of nothing more than her unwillingness to pay Christie's fees and expenses. As a result, the first factor for determining whether to preclude Marchig's testimony weighs in favor of preclusion. Marchig cannot point to her health problems or age to explain her inability to act in accordance with multiple Court Orders, especially given her repeated willingness to appear for a deposition despite her ailments. Marchig had many months and numerous options to make herself available for deposition but declined to do so.

With respect to the second factor, Marchig's testimony admittedly is central to her replevin claim. Christie's has produced documents in discovery which demonstrate that Christie's received the drawing at issue without a frame. Marchig thus would need her sworn testimony to create a material issue of fact – begging the question of why she refused to make herself available for deposition.

Nevertheless, the third factor – prejudice – weighs overwhelmingly in Christie's favor. In the absence of a deposition, Christie's would have no ability to prepare for and properly defend against testimony later offered by Marchig. *See Chamblee v. Harris & Harris, Inc.*, 154 F. Supp. 2d 670, 679 (S.D.N.Y. 2001) (court granted motion to exclude testimony of two witnesses because plaintiff failed to produce them "on the date of their depositions, [and] defendants' opportunity to defend the alleged testimony of these witnesses has been greatly prejudiced"). The importance of Marchig's testimony only increases the severity of the prejudice Christie's will suffer if the Court allows Marchig to testify for any purpose without having been deposed.

Finally, New York precedent instructs the Court to consider the possibility of a continuance. As a preliminary matter, this Court granted Marchig an extra two weeks after the close of discovery to appear for a deposition and she still failed to appear. A second continuance is therefore not appropriate. Furthermore, a second continuance would be wasteful given that Marchig refuses to come to New York until trial, *and* refuses to pay Christie's fees and expenses to travel to a deposition near her home. During virtually the entirety of this case, Marchig and her counsel have been pushing for her deposition. It was only after this Court decided that Marchig would have to bear reasonable fees and expenses of Christie's counsel for a deposition in Europe that Marchig became unwilling to comply with the Court's Orders. Marchig now refuses to appear for an in-person deposition regardless of where it is located. Accordingly, a further delay in the proceedings, through a second continuance, will not change the current posture of the parties.

The factors relevant to whether preclusion is an appropriate sanction plainly weigh in favor of Christie's present motion. Although Marchig's testimony is important to her case, the remaining factors – Marchig's lack of a legitimate explanation for her non-compliance with the Court's discovery orders; the severe prejudice that Christie's will suffer if her testimony is permitted; and the ineffectiveness of a continuance – strongly support preclusion of Marchig's testimony.[1]

II. PRECLUSION IS THE PROPER SANCTION, IN LIGHT OF THE MANY OPPORTUNITIES MARCHIG HAS HAD TO COMPLY WITH THE COURT'S ORDERS.

"A district court has wide discretion in imposing sanctions, including severe sanctions, under Rule 37(b)(2)." *Daval*, 951 F.2d at 1365. Under the circumstances of this case, a sanction of preclusion would be particularly appropriate. Two considerations guide the court's exercise of its discretion: "[t]he rule expressly requires that the sanctions must be 'just'; and the sanction must relate to the particular claim to which the discovery order was addressed." *Id.* at 1366, *citing Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707 (1982). "The Supreme Court has indicated that in determining whether a sanction is 'just,' the record should be reviewed to ascertain whether the district court abused its discretion." *Id.*, *citing Insurance Corp. of Ireland*, 456 U.S. at 707-08.

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[1] Courts may also consider the following factors in deciding whether to impose sanctions, such as preclusion, under Rule 37 for failure to comply with discovery:

> (1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of … noncompliance.

Chiquita Int'l, Ltd. v. M/V Cloudy Bay, 262 F.R.D. 318, 323 (S.D.N.Y. 2009) (internal citations omitted).

Consideration of these factors only lends further credence to Christie's present application. Marchig has no reasonable basis for ignoring the Court's Orders, as discussed above. There is no lesser sanction that would deter Marchig's further noncompliance with Court Orders, or assuage the prejudice that would be suffered by Christie's if the Court permits her testimony. Marchig has been non-cooperative in the scheduling of her deposition since the Court first decided the issue of Christie's travel expenses. Finally, this Court clearly warned Marchig of the possibility of preclusion should she fail to appear for a deposition within the time specified by the Court. *Endorsement Order*, Nov. 21, 2011.

Preclusion of Marchig's testimony is just under Rule 37 because this Court warned Marchig on November 21, 2011, that her testimony might be excluded if she did not appear for her deposition. [Dkt No. 44.] *See Insurance Corp. of Ireland*, 456 U.S. at 708 (Court noted that lower court expressly warned that sanctions would be imposed if party failed to comply). Marchig nevertheless ignored this warning and failed to appear. Preclusion is also appropriate because it is specifically tailored to Marchig's failure to comply with Court Orders requiring her to provide deposition testimony.

Marchig's counsel protests that her age and ill health, as evidenced by doctors' notes, provide ample justification for her repeated failures to appear for deposition. Yet, none of these factors seemed to hinder Marchig from offering to appear for a deposition throughout most of this case. Marchig has had multiple opportunities to complete her deposition and, even in the face of this Court's strong warning of preclusion, refused to appear. Precluding her testimony is a just and proper sanction. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (availability of severe sanctions necessary both to penalize recalcitrant parties and deter others from similar conduct).

CONCLUSION

For the foregoing reasons, Christie's respectfully requests that this Court grant the instant motion to preclude Marchig's testimony and grant such other relief as the Court may deem just and proper.

DATED: December 16, 2011
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